IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 328

EDWARD SIMON WEIN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the Supreme Court of the State of California.

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The holding of the defendant for five days without being taken before a magistrate for arraignment, during which time he was exhibited to public view by way of newspapers, television, confronted by witnesses, and forced to submit to accusatory statements by witnesses, requires that this court direct the state court, the Supreme Court of State of California, to direct the trial court to take evidence upon this issue, in order that the Supreme Court of California may have a complete record before it, something it does not now have upon this issue 4

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STATE OF CALIFORNIA.

Petition for Rehearing of Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Edward Simon Wein, prays that a rehearing be granted, and that petitioner's petition for a Writ of Certiorari issue, for the purpose of determining whether or not the Supreme Court of the State of California should direct the Superior Court of the State of California, in and for the County of Los Angeles, to take evidence upon two propositions.

(1) To take evidence upon the issue of whether or not the defendant-petitioner was arraigned and taken before a magistrate without "unnecessary delay," so that the record before the Supreme Court of California may be complete upon that issue, your petitioner having asked the Supreme Court of California to augment the record to bring before that court all the facts concerning the failure to promptly arraign the defendant before a magistrate, five days having elapsed before he was so arraigned. In

addition to the motion to augment the record, the petitioner made an additional motion to recall the remittitur and sought an order by the Supreme Court for the purpose of taking testimony before the Superior Court (trial court), so that all of the facts concerning the "unnecessary delay" in arraigning this defendant, your petitioner, could be before the Supreme Court of California. This application was likewise denied (50 A. C. No. 19, Minutes, p. 1; see also Motion to Augment Record, Certified Copy of the Minutes of the Municipal Court attached thereto, Record on Appeal, Folder III).

(2) Your petitioner also seeks to have the Writ of Certiorari issue, to the end that an appropriate order may be made directing the Supreme Court of the State of California to direct the Superior Court of the State of California, in and for the County of Los Angeles (trial court), to take evidence upon the facts and circumstances concerning the withdrawal of the plea of "not guilty by reason of insanity," your petitioner contending that it was not freely or voluntarily withdrawn, and that your petitioner was not fully advised of the consequences of such act, and that it amounted, therefore, to a denial of due process. [See: Record, Folder I, Rep. Tr., Vol. 1, pp. 3-6, incl.]

Unless certiorari issues to bring about these two things, it means that this defendant, your petitioner, has not had a hearing upon the issues, and that the full facts concerning the failure to arraign your petitioner "without unreasonable delay," and the failure of the court to fully advise your petitioner of the facts and circumstances and the consequences resulting to him concerning the withdrawal of the plea of not guilty by reason of insanity, have not fully been placed before the court, nor at all; and your petitioner stands before this court without ever having had a

hearing upon the issue of "unnecessary delay" in arraigning petitioner, and in withdrawing his plea of "not guilty by reason of insanity." The full facts can only be before the Supreme Court of California, which has affirmed his conviction and the judgment of death, by this course of conduct.

Statement of Case.

The case involves the infliction of the death penalty upon your petitioner, charged and convicted of offenses compounded from charges of kidnaping for rape, where none of the alleged victims were moved more than from one room to another in their own homes, where none of the alleged victims suffered death or real aggravated personal injuries other than sexual contact.

The Supreme Court of California affirmed the convictions, Mr. Justice Carter dissenting; the petition for certiorari was filed with this Court, and the same was by this Court denied October 20, 1958.

Questions Presented.

I.

The petitioner was held by the police for five days without being taken before a committing magistrate. There was unnecessary delay in arraigning the petitioner during which time he was exhibited to public view by way of television, newspapers and in show-ups; confronted by witnesses, accusatory statements made, his replies used against him; identification was made by reason of the conduct of officers during the period between arrest and arraignment, in violation of his constitutional rights. It amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

The defendant, your petitioner, was denied that fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States; the conduct of the trial and the incidents occurring therein violated due process. In particular, he was not advised of the consequences of the withdrawal of the plea of not guilty by reason of insanity.

ARGUMENT.

Points and Authorities.

I.

The Holding of the Defendant for Five Days Without Being Taken Before a Magistrate for Arraignment, During Which Time He Was Exhibited to Public View by Way of Newspapers, Television, Confronted by Witnesses, and Forced to Submit to Accusatory Statements by Witnesses, Requires That This Court Direct the State Court, the Supreme Court of the State of California, to Direct the Trial Court to Take Evidence Upon This Issue, in Order That the Supreme Court of California May Have a Complete Record Before It, Something It Does Not Now Have Upon This Issue.

We respectfully urge that this Court, in order to satisfy due process, should direct the California Supreme Court to direct the lower court (Superior Court of the State of California, in and for the County of Los Angeles, the trial court) to take evidence on the issue of the "unnecessary delay" in arraigning the petitioner. This Court, we respectfully urged, should grant certiorari to fully consider this all-important point, to the end that appropriate orders may be made by this Court directing the Supereme Court of California to direct the taking of such evidence by the trial court.

Before the Supreme Court of California, we moved to augment the record and bring before that court the record of the municipal court which showed the failure to promptly arraign the defendant; in fact, he was held for more than five days. [See Folder III, Record on Appeal, Motion to Augment Record, Certified Copy of the Minutes of the Municipal Court attached thereto.] Subsequently, a motion before the Supreme Court of California was made to recall the remittitur, and for an order directing the trial court to take evidence upon this issue. This application was denied. (50 A. C. No. 19, Minutes, p. 1.) Your petitioner was held for more than five days, during which time he was exhibited to witnesses; his pictures were put in the newspapers; his picture was put on television; radio comments were made about him, and the entire case was largely built from evidence obtained during that period. He was never taken before a committing magistrate before five days, notwithstanding he had been in the District Attorney's office, but one floor away from the committing magistrates. We must, in order to answer due process, place before the Supreme Court of California, evidence as to these matters; it can now only be done by order of this Court. It should be borne in mind that the Supreme Court of California refused your petitioner an opportunity to bring these facts, which have never been denied, before the Supreme Court that it might properly pass upon the issue. Because of some limitation in the rules, the Supreme Court refused to consider the matter.

May we respectfully direct the Court's attention to the case of *Chessman v. Teets*, 354 U. S. 156, 1 L. Ed. 2d 1253, 77 S. Ct. 1127, where this Court said, at 1260:

"On many occasions this Court has found it necessary to say that the requirements of the Due Process

> Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

We say it amounted to a denial of due process to deny to this petitioner the right to have before the Supreme Court of California, in passing upon whether or not they should affirm the death sentences, the full facts concerning the delay in his arraignment.

We contend that the case of *Mallory v. United States*, 354 U. S. 449, 1 L. Ed. 2d 1479, clearly supports our position that this man was not arraigned in accordance with law, and that there was "unnecessary delay", to his prejudice, in holding him five days before he was taken to a committing magistrate. To permit this to stand merely because the rules were uncertain as to the manner in which a record might be augmented, is clearly a denial of due process, and this Court itself has said in *Hoffman v. United States*, 341 U. S. 479, 95 L. Ed. 1118, "Accordingly, the supplemental record should have been considered

by the Court of Appeals." We urge that this can only be answered by sending this case back to the lower court for the taking of evidence upon this all-important issue, so that then the Supreme Court of California may have the evidence before it, and pass upon it intelligently.

II.

The Withdrawal of the Plea of Not Guilty by Reason of Insanity Was Not Free or Voluntary, and Acceptance of the Withdrawal of Such Plea Without Advising the Appellant of the Consequences Thereof, Constitutes a Violation of Due Process.

We urge that it cannot be successfully denied that the withdrawal of the plea of not guilty by reason of insanity was forced upon the defendant and his counsel. [Record, Folder I, Rep. Tr., Vol. I, pp. 3-6, incl.] We urge there is nothing in the record to show that appellant was ever advised of the nature of the defense he could interpose under such a plea of not guilty by reason of insanity; nor was the petitioner advised that he could not interpose a plea of insanity under his plea of not guilty; nor was the defendant ever advised that he was not bound by the reports of the alienists, in which they stated he was sane; nor was he advised that he had a right to cross-examine the prosecutor's alienists, and to call his own alienists, together with other witnesses, to controvert the reports of the prosecutor's alienists, or those named by the court; nor was he ever advised that the reports of the alienists were not binding upon him; nor was he advised that the issue of his sanity, under his plea of not guilty by reason of insanity, presented a jury question, and that a jury was not bound by the opinions and the conclusions of the alienists, but might consider entirely different evidence to be offered by the defendant, by lay persons, by the defen-

dant himself by his conduct. The record is silent upon any appropriate showing that the defendant, when he withdrew his plea of not guilty by reason of insanity, had any knowledge upon these subjects. We respectfully urge that it amounted to a denial of due process, and that the only way that it can now be cured is for this Court to grant certiorari, and eventually to direct the Supreme Court of California to direct the Superior Court of the State of California, in and for the County of Los Angeles, to take evidence upon this all-important issue as to whether or not this defendant was fully advised. The record now fails to show he was so advised, and if that be the case, then the Supreme Court of California could do no less than reverse the conviction, for it would amount to a denial of due process of law. Substantial rights were taken from him, without any possible showing as to the full consequences thereof.

As was said in *State v. Ferranto*, 112 Ohio St. 667, 148 N. E. 362:

> "A plea of guilty in a capital offense should be accepted cautiously and the trial judge should fully advise the accused of his rights in the premises and be satisfied that he acts willingly, freely and deliberately, after being so advised, and with knowledge, appreciation and understanding of the nature and consequences of such plea of guilty."

Certainly the same rule would apply in the withdrawal of the plea of not guilty by reason of insanity, which might completely have vindicated this petitioner.

See also:

United States v. Mack, 249 F. 2d 421;

Smith v. United States, 238 F. 2d 925.

Conclusion.

We respectfully contend that a rehearing should be granted, as it is apparent that this Court could not properly act without having before it all of the facts and circumstances concerning, first: the five day period during which the defendant, your petitioner, was not arraigned "without unnecessary delay," and, secondly, the Supreme Court of California, and this Court, should have before it all of the facts concerning the withdrawal of the plea of "not guilty of reason of insanity." This can only be done by directing the Supreme Court of California to direct the lower court to take testimony upon these issues.

Wherefore, it is respectfully urged that the petition for rehearing should be granted, so that the case may be remanded to the Supreme Court of the State of California with directions: first, to direct the Superior Court of the State of California, in and for the County of Los Angeles, the trial court, to take evidence upon the question of the "unnecessary delay" in arraigning the defendant-petitioner; second, to take evidence upon the issue of the withdrawal of the plea of not guilty by reason of insanity, so that that record may be appropriately prepared and submitted to the Supreme Court of the State of California, so that it may appropriately and properly reconsider its determination of the appeal herein upon those two particular issues; for it will then have it before it the facts, which it does not now have, or did not, at the time of the pronouncement of the affirmation of judgment in this case.

Respectfully submitted.

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Attorneys for Defendant-Petitioner,
Edward Simon Wein.

Certificate of Counsel.

Russell E. Parsons does hereby certify:

1. That he is one of counsel for the petitioner and one of the attorneys on this petition for certiorari and this petition for rehearing of the petition for certiorari;

2. That the petition for rehearing is presented in good faith and not for delay; and

3. That the petition is restricted to the grounds hereinabove stated.

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Attorney for Petitioner,
Edward Simon Wein.